UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION–FLINT

In re:

BRIGHTON TOOL AND SUPPLY, INC.

Case No. 04-31593
Chapter 7
Hon. Walter Shapero

Debtor.
____________________________________/

OPINION DENYING TRUSTEE'S OBJECTION TO
THE CLAIM OF MAKITA, USA, INC.

Trustee Collene Corcoran ("Trustee"), seeks disallowance of the claim of Makita, USA, Inc. ("Makita"). For the reasons stated here, the Trustee's objection to Makita's claim is DENIED.

Facts

The facts in this case are not disputed. Brighton Tool and Supply, Inc. ("Brighton"), filed a chapter 7 petition on April 13, 2004. The claims bar date was set at October 18, 2005. Makita mailed its proof of claim, totaling $12,335.54, via certified mail on September 27, 2005. The Court received the proof of claim on October 22, 2005 – twenty five days after mailing, and four days after the claims bar date. The Trustee objected to Makita's tardy claim and seeks its disallowance.

Analysis

Bankruptcy Rule 3002(c) provides, "In a chapter 7 liquidation . . . a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code . . . ."

Courts in the past have been split as to whether Rule 3002 creates a strict bar against late claims, or whether late claims will be allowed, but not considered "timely" under § 502.[1]

In an attempt to remedy this confusion, §§ 502 and 726 were amended in 1994; however, courts were still apparently confused, as evidenced by their continued split after the 1994 amendments. In a further attempt to remedy the situation, the legislative history of Rule 3002 was amended in 1996 to clarify the interplay between § 502, § 726 and Rule 3002. The legislative history of the 1996 amendment provides:

> The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that a holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).
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> The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code, rather than by this rule.

IRS v.Chavis (*In re Chavis*), 47 F.3d 818, 821-22 (6th Cir. 1995).

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[1]Unfortunately, there is tremendous disparity among the courts that have addressed this issue. The decisions that support a strict bar date include: *United States v. Clark*, 166 B.R. 446 (D. Utah 1993); *In re Jones*, 164 B.R. 543 (Bankr. N.D. Tex. 1994); *Matter of Andrew*, 162 B.R. 46 (Bankr. M.D. Ga. 1993); *In re Leightner*, 161 B.R. 60 (Bankr. D. Or. 1993); *Matter of Keck*, 160 B.R. 112 (Bankr. N.D. Ind. 1993); *In re Stoiber*, 160 B.R. 307 (Bankr. N.D. Ohio 1993); *In re Messics*, 159 B.R. 803 (Bankr. N.D. Ohio 1993); *In re Crooker*, 159 B.R. 790 (Bankr. E.D. Ky.1993); *In re Zimmerman*, 156 B.R. 192 (Bankr. W.D. Mich. 1993) (*en banc*); and, *In re Bailey*, 151 B.R. 28 (Bankr. N.D.N.Y. 1993). Courts finding that Rule 3002 does not impose a strict bar date include: *Matter of Osman*, 164 B.R. 709 (Bankr. S.D. Ga. 1993); *In re Babbin*,164 B.R. 157 (Bankr. D. Colo. 1994); *In re Sullins*, 161 B.R. 957 (Bankr. M.D. Tenn.1993); *Matter of Brenner*, 160 B.R. 302 (Bankr. E.D. Mich.1993); *In re Judkins*, 151 B.R. 553 (Bankr. D. Colo. 1993); and, *In re Rago*, 149 B.R. 882 (Bankr. N.D. Ill. 1992).

FED. R. BANKR. P. 3002 advisory committee's note.

Section 502 requires a court to allow a tardily filed claim, provided that it complies with § 726(a)(1)-(3):

> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.
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> (b) . . . if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, *and shall allow such claim* in such amount, *except* to the extent that–
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> . . .
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> (9) *proof of such claim is not timely* filed, *except* to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide . . . .

11 U.S.C. § 502(b)(9) (emphasis added).

The tardily filed claims permitted by § 726 are as follows:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed–
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> . . .
>
> (2) second, in payment of any allowed unsecured claim . . . proof of which is--
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> (C) tardily filed under section 501(a) of this title, if--
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> (I) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
>
> (ii) proof of such claim is filed in time to permit payment

> of such claim;
>
> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection . . . .

11 U.S.C. § 726.

The legislative history of § 726 states that (a)(2) was written to avoid penalizing those creditors who did not timely file because they did not receive proper notice, by giving such creditors priority over those creditors who received notice and were simply tardy filers; or, alternatively, to punish general unsecured creditors who do not timely file by statutorily subordinating them to those who are blameless for their tardy claim filings. 11 U.S.C. § 726 advisory committee's note.

This legislative history indicates that when a creditor who receives notice tardily files a claim, it will be allowed. In support of the contrary, Trustee cites to only a single case decided after the clarification of the relevant amendments by the 1996 amendments to the legislative history of Bankruptcy Rule 3002 – *Gardenhire v. IRS* (*In re Gardenhire*), 209 F.3d 1145 (9th Cir. 2000).

Gardenhire was a chapter 13 case in which the IRS filed a claim after the 180 day period in which governmental entities can file a proof of claim had expired. Bankruptcy Rule 9006 allows for the enlargement of this time period, as long as the request for enlargement is made prior to the expiration of the 180 day period. F.R. BANKR. P. 9006(b)(1). In *Gardenhire*, the IRS did not seek enlargement of the time to file. Following the *Gardenhire* court's reasoning, the IRS's claim would have been allowed, had the IRS followed § 502(b)(9) and Rule 9006, allowing a later filing. The IRS's claim was disallowed because it did not comply with the § 502(b)(9) governmental late-filing provision, allowing for a tardy filing "as the Federal Rules of Bankruptcy Procedure may provide;" specifically, through

Rule 9006.

Gardenhire falls within the exception to the exception in § 726. The primary exception to § 502(b)(9) allows a claim "as permitted under" § 726(a)(1), (2) or (3); the exception to this exception (*i.e.*, meaning a claim will *not* be allowed), applies to the type of claim asserted in *Gardenhire*.

Gardenhire is also a chapter 13 case, which is significant. Tardily-filed claims should be, and are, treated differently in chapter 7 and chapter 13 cases. *See IRS v. Chavis* (*In re Chavis*), 47 F.3d 818 (6th Cir. 1995) ("In a Chapter 7 action, the debtor's non-exempt assets are liquidated and the proceeds are distributed to the creditors. Accordingly, even late-filed claims must be paid before any distribution to the debtor may be made.")[2]; *In re Bargdill*, 238 B.R. 711 (Bankr. N.D. Ohio, 1999) ("[O]f paramount importance in a reorganization case is the need of the debtor to know with certainty the amount and number of the allowed claims in order for the debtor to formulate a feasible plan of reorganization. On the other hand, the policy reasons to disallow tardily filed claims in a Chapter 7 liquidation case are much weaker when the balance of any unclaimed funds are simply paid to the debtor.").

This case is not a chapter 13 case, and, since Makita is not a governmental entity, it does not fall within the exception to the exception of § 726. Essentially, *Gardenhire* is distinguishable from this case on several relevant facts.

Conversely, chapter 7 cases that do not involve governmental entities, and that have been decided since the clarifying amendments to the legislative history of Rule 3002 were made, have found

[2]Interestingly, this case was cited by the Trustee in support of her contrary position.

tardily-filed, unsecured claims allowable if they would otherwise be allowable under § 726(a). *See In re Bargdill*, 238 B.R. 711 (Bankr. N.D. Ohio 1999); *see also Perry v. First Citizens Federal Credit Union* (*In re Perry*), 391 F.3d 282 (1st Cir. 2004).

In *In re Bargdill*, the debtors filed a Chapter 7 petition, which the trustee deemed to be a no-asset estate. A creditor bank sought to have the stay lifted to enable it to sell secured property. Furthermore, since the bank was undersecured, it helped the trustee locate several transactions that could potentially bring more funds into the estate. The funds located by the trustee with the bank's help caused the trustee to change the no-asset status of the case. Even though the bank received notice of the claims bar date, due to a clerical error, it failed to file a timely proof of claim.

All interested parties eventually stipulated to relief from the stay, which was memorialized by court order. After the claims bar date, the bank realized it had not filed a formal proof of claim. The bank moved to amend what it claimed was an informal proof of claim, *i.e.*, the stipulated agreement for relief from stay, and at the same time filed a tardy formal proof of claim. The court held that the stipulated agreement for relief from stay could not be considered an informal proof of claim, and therefore an amendment to it could not be filed; however, the court held that the tardily-filed formal proof of claim would be allowed, but given priority under § 726(a)(3) due to its untimeliness.

The relevant facts of *Bargdill* are indistinguishable from those in this case. The creditor had notice, the debt was unsecured, and the creditor failed to timely file a formal proof of claim with the court.

Conclusion

For the reasons stated in the Court's opinion, the Trustee's objection to Makita's tardily-filed claim is denied; however, the claim will be allowed with priority pursuant to § 726(a)(3).

Entered: May 31, 2006

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge